

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 29, 2014

v

XAVIER ERIC SMITH,

Defendant-Appellant.

No. 315031
Wayne Circuit Court
LC No. 12-009043-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his convictions after a bench trial of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 10 to 20 years' imprisonment for armed robbery, to be served consecutively to a two-year sentence for felony-firearm. Defendant argues that his trial counsel was ineffective, and that the trial court misapplied the sentencing guidelines. We affirm.

I. FACTS

In the afternoon of August 15, 2012, the victim stopped at an apartment building in Detroit to pick up money owed to him by the building's manager. After picking up the money, the victim walked outside. Defendant and a second man ran up to the victim from behind. Defendant placed a gun on the victim's right temple, and told his accomplice to "find the money." The men took the victim's money, keys, identification, and telephone. The victim reported the crime to police, and later identified defendant in a photographic lineup. The victim recognized defendant because he saw him every day. However, the victim could not identify the second man. After a bench trial, the trial court convicted defendant of armed robbery and felony-firearm. The trial court sentenced defendant as noted already.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that trial counsel was ineffective for failing to seek to exclude other acts evidence pursuant to MRE 404. We disagree.

With a claim of ineffective assistance of counsel, we review any findings of fact by the trial court for clear error and review de novo the legal question of whether constitutionally adequate assistance was provided. *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531

(2011). Where, as here, defendant did not move for a new trial or make a record in the trial court,¹ the claim is unreserved. Consequently, our review is limited to mistakes apparent on the existing record. *Id.* To establish his claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness according to prevailing professional norms, (2) there is a reasonable probability that, but for counsel's mistake, the result of the proceedings would have been different. *Id.*

On November 11, 2012, the prosecutor filed a notice of intent to introduce evidence that defendant had participated in a similar armed robbery in the same area of Detroit as other acts evidence pursuant to MRE 404(b). But the prosecutor never filed a motion to introduce such evidence or attempted to do so at trial. Regardless, defendant argues that trial counsel's conduct in failing to challenge this evidence was objectively unreasonable and not sound trial strategy. Defendant's arguments lack merit.

Defendant simply cannot demonstrate that the outcome of the trial would have been different had trial counsel challenged the admissibility of the prosecution's proposed evidence. Because this evidence was not admitted at trial, the evidence alone could have had no effect on the outcome of the trial. Nonetheless, defendant, relying upon his own affidavit attached to his brief on appeal, argues that because trial counsel informed defendant that this evidence could be admitted if defendant testified at trial, he chose not to testify in his own defense.² Defendant asserts that had he testified there is a reasonable probability he would have been acquitted.

A defendant must establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant's own self-serving affidavit, which he attached to his brief on appeal, is the only evidence offered by defendant to support his claim. As noted already, our review is limited to the existing record. *Brown*, 294 Mich App at 387. See also *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001) (in review of an unreserved claim of ineffective assistance of counsel, refusing to consider an affidavit the defendant submitted with his brief on appeal because it was not a part of the lower court record). The record only reflects that defendant was informed of his right to testify and that he voluntarily waived that right. Thus, defendant cannot meet his burden to establish the factual predicate for his claim, i.e., that his decision whether to testify was affected by trial counsel's advice, and accordingly, cannot demonstrate that he received ineffective assistance of counsel. *Hoag*, 460 Mich at 6. In addition, because defendant did not testify, and this Court's review is limited to the record, there is no way to determine what effect, if any, defendant's testimony could have had on his trial. Accordingly, defendant cannot establish that he received

¹ See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² There is no requirement that a defendant first testify before a prosecutor may introduce evidence under MRE 404(b). See *People v Mardlin*, 487 Mich 609, 614-616; 790 NW2d 607 (2010). It is possible the prosecution might have offered evidence of defendant's prior conviction for larceny from a person to impeach his credibility if defendant had chosen to testify, even if his prior convictions were not offered as other acts evidence. See MRE 609(a)(2).

ineffective assistance of counsel because he cannot demonstrate that the result of the proceedings would have been different had defendant testified. *Brown*, 294 Mich App at 387.

III. SENTENCING GUIDELINES SCORING

Defendant next argues that the trial court erroneously scored prior record variable (PRV) 3 and offense variable (OV) 13. We disagree. Defendant preserved his challenge to the trial court's scoring of PRV 3 and OV 13 by filing a motion to remand in this Court. *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), citing MCL 769.34(10). Our Supreme Court recently clarified the standard of review to be applied to this issue in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013):

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

PRV 3 is assessed 10 points where a defendant has "1 prior high severity juvenile adjudication." MCL 777.53(1)(c). When scoring PRV 3, a prior high severity juvenile adjudication includes "a juvenile adjudication for conduct that would be . . . [a] felony under the law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D." MCL 777.53(2)(b). Defendant contends that the trial court erroneously assessed 10 points for PRV 3 because his prior juvenile adjudication in Palo Pinto, Texas, was equivalent to third-degree home invasion, MCL 750.110a(4), which is not a high-severity juvenile adjudication because it is a Class E offense. MCL 777.16f; MCL 777.53(2)(b).

According to defendant's presentence investigation report (PSIR), defendant received a juvenile adjudication of "Burglary on Habitation Felony 2nd Degree" in the Palo Pinto County Court of Texas on May 17, 2007. "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). At sentencing, defendant did not contest the accuracy of the report. Accordingly, the report is presumed to be accurate, and the trial court was entitled to rely on the report. *Id.*

Tex Penal Code Ann 30.02(a), Texas's burglary statute, states:

A person commits an offense if, without the effective consent of the owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Pursuant to Tex Penal Code Ann 30.02(c)(2), this offense is a “felony of the second degree if committed in a habitation.”

In comparison, MCL 750.110a(3) and (4) provide:

(3) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii) A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

Thus, the difference between second- and third-degree home invasion under MCL 750.110a depends on the nature of the defendant’s intent or conduct while inside the dwelling. If defendant committed or intended to commit a “felony, larceny, or assault” inside the dwelling, defendant committed the equivalent of a second-degree home invasion; if defendant committed or intended to commit only a misdemeanor or violated a probation condition, parole condition, personal protection order, or pretrial release condition, he committed the equivalent of a third-degree home invasion. MCL 750.110a(3) and (4). Defendant could not have been convicted of second-degree burglary under Tex Penal Code Ann 30.02(a) unless he was found to have either committed a felony, theft, or assault, or to have had the intent to commit a felony, theft, or assault, while inside the dwelling. Thus, defendant’s Texas adjudication is equivalent to an adjudication of second-degree home invasion, not third-degree home invasion, under Michigan law. Because defendant has a prior juvenile adjudication for a crime in Texas that corresponds to second-degree home invasion, MCL 750.110a(3), a Class C felony, MCL 777.16f, the trial court correctly assigned 10 points to PRV 3. MCL 777.53(1)(c) and (2).

Further, even if PRV 3 were assigned zero points as defendant requests, resentencing would not be required. Because armed robbery is a Class A offense, MCL 777.16y, defendant's sentencing grid is found in MCL 777.62. Under this grid, a PRV level of D applies to PRV scores ranging from 25 to 49 points. MCL 777.62. Defendant's total PRV score was 40 points. Thus, a PRV score of 30 sought by defendant on appeal would not change his PRV level, and accordingly, would not affect his sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant next contends that the trial court erroneously scored OV 13. OV 13 "is continuing pattern of criminal behavior." MCL 777.43(1). OV 13 is assigned 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(c). Defendant contends that, because he only has one prior conviction for a crime against a person, the trial court erred by assigning 25 points to OV 13. However, the trial court is not limited to considering only prior convictions when scoring OV 25. "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2). A sentencing court may consider charges that do not result in a conviction if there is a preponderance of the evidence supporting that the offense took place. *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013).

On June 23, 2010, defendant pleaded guilty to larceny from the person, MCL 750.357, and felony-firearm, MCL 750.227b. According to defendant's PSIR, on March 5, 2010, defendant produced a revolver, struck a man in the head with the weapon, and demanded that the man give defendant his possessions. Defendant pointed the weapon at the man's head, and took the man's book bag and cellular phone. Officers found defendant with a revolver in his waistband. Defendant was charged with armed robbery, carrying a concealed weapon, felony-firearm, and larceny from a person. In a plea agreement, defendant pleaded guilty to felony-firearm and larceny from a person, and the remaining charges were dismissed.

From the facts stated in defendant's PSIR, the trial court could easily conclude by a preponderance of the evidence that defendant committed an armed robbery on March 5, 2010. An armed robbery occurs when the defendant, "in the course of committing a larceny . . . assaults or puts the person in fear," and possesses a dangerous weapon. MCL 750.529; MCL 750.530. The facts articulated in defendant's PSIR demonstrate that defendant committed a larceny, and while doing so, assaulted the victim with a gun. Thus, although defendant was not convicted of armed robbery in relation to the March 5, 2010 incident, the trial court did not err by including the charge of armed robbery when scoring OV 13. *Nix*, 301 Mich App at 205.

Defendant was convicted of larceny from the person, MCL 750.357, as part of his June 23, 2010 plea. Larceny from the person is a crime against a person. MCL 777.16r. Defendant was convicted in the instant case of armed robbery, and the trial court properly included defendant's earlier charge of armed robbery, even though defendant was not convicted of that crime, when scoring OV 13. *Nix*, 301 Mich App at 205. Armed robbery is also a crime against a person. MCL 777.16y. Thus, because defendant's history included three crimes against a person within a five-year period, the trial court properly scored OV 13. MCL 777.43.

Finally, defendant argues that trial counsel was ineffective for failing to object to the trial court's scoring of PRV 3 and OV 13. Because the trial court did not erroneously score PRV 3 or OV 13, trial counsel was not ineffective for failing to object to the scoring of either variable. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood